Office-Supreme Court, U.S.
FILED
MAR 6 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GENERAL MOTORS CORPORATION

ALOYSIUS F. POWER,
HARRY S. BENJAMIN, JR.,
3044 West Grand Boulevard,
Detroit 2, Michigan,
Attorneys for General Motors Corporation.

EUGENE L. HARTWIG,
3044 West Grand Boulevard,
Detroit 2, Michigan,
Of Counsel.

Interstate Brief & Record Co., 350 Congress St. E., Detroit 26, Michigan

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2-3
Counter-Statement of Question Presented	3
Counter-Statement of Case	4-8
A. The Board's relevant factual conclusions and other relevant undisputed facts	4-7
B. The Board's erroneous conclusion	7
C. The Decision of the Court of Appeals	7-8
Summary of Argument	8-10
Argument	10-47
A. The Union's "agency shop" proposal with respect to which General Motors declined to bargain did not contain an "option". The record demonstrates that an "option" was not intended. In any event, an "option", such as that which the Petitioner urges, would be meaningless and invalid as a matter of law	10-17
B. The "agency shop" proposal, concerning which the Union requested the Company to bargain, is contrary to the fundamental policy of the National Labor Relations Act as expressed in Section 7 thereof	17-34
1. The sole limitation on the exercise by employes of their Section 7 rights is found in the statutory exception to that Section wherein permission is granted to employers and labor organizations to enter into agreements requiring membership in a labor organization as a condition of employment	19-26

Page

2. The scope of the exception to Section 7 is not enlarged by Section 8(a)(1) 26-27

3. The scope of the exception to Section 7 is not enlarged by Section 8(a)(3) 27-31

4. The final "proviso" of Section 8(a)(3) is inapplicable and, in any event, provides no basis for holding that the "agency shop" arrangement proposed herein is lawful.... 31-34

C. The Court of Appeals acted properly in holding that the clear, unambiguous words used by Congress in enacting the statute rendered the "agency shop" illegal, and that resort to legislative history to determine what the statute meant was neither necessary nor required.... 35-37

D. The two Board decisions and two Court decisions upon which the Petitioner relies principally are either inapposite or support the position of General Motors..... 37-42

E. The one contention advanced by the amici which is different from the already answered arguments made by the Petitioner is grounded principally upon inaccurate, misleading, and irrelevant information and data..... 42-46

F. The "agency shop" arrangement, demanded by the UAW, being violative of the Act, General Motors has no obligation to bargain with respect thereto 46-47

Conclusion 48

CITATIONS

Cases:

	Page
American Seating Company, 98 NLRB 800	37, 43
Bryan Manufacturing Company, 119 NLRB 502, 510; enf. 264 F. 2d 575 (C.A.D.C.); rev'd. on other grounds 362 U.S. 411	22, 28
Conley, et al. v. Gibson, et al., 355 U.S. 41, 46	29
Flora v. United States, 357 U.S. 63	24
Hughes Tool Co. v. National Labor Relations Board, 147 F. 2d 69, 74-75 (C.A. 5)	29
Jencks v. United States, 353 U.S. 657, 679	24
National Labor Relations Board v. Coca-Cola Bottling Company, 350 U.S. 264, 268	24
National Labor Relations Board v. American National Insurance Company, 343 U.S. 395 (1952)	47
National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al., 315 U.S. 685, 694-695	22, 28
National Labor Relations Board v. Schwartz, 146 F. 2d 773, 774 (C.A. 5)	18
National Labor Relations Board v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958)	47
National Maritime Union of America, 78 NLRB 971, 981; enf. 175 F. 2d 686 (C.A. 2); cert. den. 338 U.S. 954	47
Public Service Company of Colorado, 89 NLRB 418	37, 42
Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17	27, 31, 34, 35, 37
Spokane & Inland Empire Railroad Company v. United States, 241 U.S. 344, 350	21, 28
Swarts v. Siegel, et al., 117 Fed. 13, 18 (C.A. 8	35

Page

Union Starch & Refining Company v. National Labor Relations Board, 186 F. 2d 1008 (C.A. 7), cert. den. 342 U.S. 815 37

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.) 2
Section 7 ..... 9, 16, 17, 19, 20, 21, 22, 23, 26, 27, 31, 32, 34
Section 8(a)(1), (3) 9, 16, 20, 21, 22, 23, 26, 27, 28, 29, 31, 32, 33, 34, 35, 37, 38, 40, 41

Miscellaneous:

Federal Mediation Service, The Agency Shop (1959) 43
Sutherland Statutory Construction, 3rd Edition, Vol. 2, Sec. 4701 35
46 LRRM 14, 18 45
82 Monthly Labor Review 1348, 1351-Table 2 45
85 Monthly Labor Review 1136 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GENERAL MOTORS CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 111-115) is reported at 303 F. 2d 428. The original Decision and Order of the National Labor Relations Board (R. 10-52) is reported at 130 NLRB 481, and the Board's Supplemental Decision and Order vacating the original Decision (R. 53-73), is reported at 133 NLRB 451.

JURISDICTION

The Court of Appeals rendered its opinion on June 8, 1962 (R. 111-115) and entered a judgment and decree on the same date (R. 110). This Court, upon the petition of the Solicitor General of the United States, filed on September 4, 1962, granted certiorari on November 19, 1962 (R. 116; 371 U.S. 908). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statutes of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *."

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an employer is guilty of a refusal to bargain in violation of the National Labor Relations Act, as amended, where he admittedly has declined to discuss with a labor organization which is the bargaining agent for the employer's employes a proposal by that labor organization that the employer enter into an agreement which would condition the continued employment of each employe of the employer who was not a member of the labor organization upon the payment to the labor organization by each such employe of a sum of money specified by the labor organization to be the equivalent of the initiation fee and periodic dues paid by members of such labor organization.

COUNTER-STATEMENT OF CASE

A. The Board's Relevant Factual Conclusions and Other Relevant Undisputed Facts

General Motors Corporation (hereinafter throughout referred to either as "General Motors" or "Company"), at all times relevant to the proceedings in this cause, had a three-year national collective bargaining agreement (Footnote 2; R. 54) with the International Union, UAW, AFL-CIO (hereinafter throughout referred to either as the "UAW" or "Union"), which was entered into under date of October 2, 1958.

This agreement contained a provision making membership in the UAW a condition of continued employment for all employes covered by the agreement. However, the agreement also contained language which made this membership requirement inoperative in any state "which prohibits or otherwise makes unlawful membership in a labor organization as a condition of employment" (Footnote 2; R. 54). Indiana has a law containing such a statutory prohibition and restraint (Footnote 4; R. 55). As a consequence, the UAW recognized that the "membership as a condition of continued employment" requirement of the aforementioned collective bargaining agreement could not be made operative with respect to those General Motors employes in Indiana plants who were represented by the UAW and who were otherwise covered by that agreement (R. 80).

On October 20, 1959, the Union proposed in writing that General Motors enter into a supplementary agreement which would have required "as a condition of continued employment" that all General Motors employes in Indiana,

who could not be compelled to become and remain members of the Union by reason of the aforementioned provision of the October 2, 1958 Agreement and the cited Indiana Statute, "pay to the UAW a sum equal to the initiation fee charged at each of our local unions involved and monthly sums equal to the regular dues required of our members at each location" (R. 100).

General Motors in a written response to the UAW dated October 27, 1959 stated that because an "agency shop arrangement * * * as * * * detailed in your letter of October 20, 1959 would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request" (R. 103).

Thereafter, the UAW filed unfair labor practice charges against General Motors with the National Labor Relations Board alleging an unlawful refusal to bargain with respect to its October 20, 1959 "agency shop" proposal. Following an investigation, a formal complaint based upon the charges was issued against General Motors by the National Labor Relations Board.

At the hearing before the Trial Examiner, General Motors introduced into evidence the Union's Constitution and called the Union's Vice President in charge of its General Motors department as a witness. He testified with respect to the operation of the Union's Constitution and explained the rights of members and the rights, if any, of non-members thereunder who would be required to pay the fee fixed in the Union's proposal. Such of the witness' testimony as is relevant to the resolution of the issue presented is undisputed (R. 77-93).

In substance, the witness testified that, while non-members under the proposed "agency shop" would be obligated

to pay an amount equivalent to the initiation fee and monthly dues that are required of members of the Union, the Union's Constitution guarantees such non-members none of the rights or privileges to which members are entitled (R. 82-92).

Thus, "agency shop" non-members would not be eligible or permitted to vote on ratification of agreements entered into or negotiated by the Union on their behalf (R. 86; 90-91) or to vote on how any of their support money would be allocated within the Union (R. 92). Likewise, they would not be entitled as a matter of right to receive the Union's publication "Solidarity" without the payment of an additional fee, although this same publication is made available to members upon their payment of monthly dues (R. 87-88). Nor would non-members have any guarantee that their payments would entitle them to strike benefits, participation in the Union's Educational Fund or to any of the other benefits guaranteed Union members (R. 89-90; 92). The witness in fact pointed out that "our constitution isn't written in terms of non-members" but "• • • is written in the sense of membership" (R. 90).

On February 20, 1961, a majority of the National Labor Relations Board in a 3-to-2 decision (R. 10-52) reached the conclusion that the "agency shop" proposal, concerning which General Motors declined to bargain, was illegal under the National Labor Relations Act, as amended, and further concluded that General Motors had not violated the law by refusing to bargain with the UAW concerning it (R. 19; 37; 41).

On September 29, 1961, less than eight months later, following the filing of Motions for Reconsideration by the General Counsel of the National Labor Relations Board and by counsel for the UAW, a reconstituted Board having two new members set aside that decision and, in a 4 to 1

Supplemental Decision and Order (R. 53-73), concluded that the "agency shop" was not illegal under the National Labor Relations Act, as amended (R. 66). It also ordered General Motors, among other things, to bargain with the UAW concerning its "agency shop" proposal made to General Motors on October 20, 1959 (R. 100).

B. The Board's Erroneous Conclusion

In its Supplemental Decision and Order, the Board also concluded that:

> "The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, but nevertheless, to condition employment upon the payment of sums of money which would constitute each employee's share of financial support." (R. 66.)

Attention is directed to the above-quoted erroneous conclusion at this point because Petitioner's principal argument herein is premised upon the existence of an "option" in the UAW's proposal to General Motors. As will be demonstrated in the "Argument" hereinafter, this "option" argument must necessarily fail when examined both in light of the facts as they appear from the evidence and testimony in the Record and the legal context in which the Union's proposal arose.

C. The Decision of the Court of Appeals

General Motors asked the Court of Appeals for the Sixth Circuit to review the Board's Supplemental Decision and Order. That Court, in a unanimous opinion rendered

on June 8, 1962 (R. 111-115), set aside the Board's Supplemental Decision and Order and denied the Board's request for enforcement (R. 110), saying, among other things:

> "We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act * * * means what it says and excepts from the operation of the law only agreements requiring membership in a labor organization. * * * An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute. In our opinion, the provision for an 'agency shop' would violate Section 7 and Sections 8(a)(1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act." (R. 114-115.)

The particular illegal "agency shop" proposal which the Court of Appeals had before it and with respect to which it concluded General Motors had no obligation to bargain (R. 111-115) was that set forth in the UAW's written bargaining demand to General Motors on October 20, 1959 (R. 100).

SUMMARY OF ARGUMENT

The "option" which the Petitioner asserts exists in, and establishes the legality of, the "agency shop" proposal to General Motors is a fiction. An option, if one could be read

into such proposal, would be a sham and afford employes at most a meaningless choice as a matter of law under the facts and circumstances of this case.

The "agency shop" proposal made by the UAW to General Motors, and with respect to which General Motors refused to bargain, fails to comport with, and is illegal under, the provisions of Section 7 and Section 8(a)(3) of the National Labor Relations Act, as amended.

The exercise by employes of their rights under Section 7 of the Act, as amended in 1947, and particularly the right to refrain from assisting a labor organization can be limited only by an agreement requiring union membership as authorized in Section 8(a)(3).

The proposal made by the UAW did not condition continued employment of General Motors employes who were not members of that labor organization upon "membership" therein but rather upon the payment to the UAW of a sum of money which was fixed at the equivalent of the initiation fee and periodic dues required of UAW members. Such an arrangement does not comport with the main clause and first proviso of Section 8(a)(3), and adoption of the arrangement would interfere with the exercise of rights guaranteed in Section 7 and would, therefore, constitute a violation of Section 8(a)(1).

The second proviso of Section 8(a)(3) is inapplicable to the facts herein and, as a consequence, affords no protective cloak for the Union's illegal proposal.

The language of the statute is clear and unambiguous, and the Court of Appeals' adoption and application of the literal language of the statute does not bring about an absurd, offensive, or otherwise legally objectionable result but, to the contrary, carries out the purpose of the Act to

protect the rights, privileges, and interests of individual workers.

The Company, being relieved as a matter of law from bargaining with respect to a proposal which, because of its objective, was illegal, did not refuse to bargain collectively in violation of the National Labor Relations Act, as amended.

ARGUMENT

A. THE UNION'S "AGENCY SHOP" PROPOSAL WITH RESPECT TO WHICH GENERAL MOTORS DECLINED TO BARGAIN DID NOT CONTAIN AN "OPTION". THE RECORD DEMONSTRATES THAT AN "OPTION" WAS NOT INTENDED. IN ANY EVENT, AN "OPTION", SUCH AS THAT WHICH THE PETITIONER URGES, WOULD BE MEANINGLESS AND INVALID AS A MATTER OF LAW.

The argument advanced and developed by Petitioner in support of the alleged legality of the "agency shop" under the amended National Labor Relations Act, as represented by the bargaining proposal made by the Union to the Company, is grounded upon the false and erroneous premise that such proposal contains an "option" which would be available to the employes covered thereby. Accuracy demands that this incorrect and misleading characterization of the Union's proposal be put to rest once and for all in order that this Court may know precisely the nature of the proposal which it is being asked to review.

What was the "agency shop" proposal made by the Union to the Company?

In its letter of October 20, 1959, the Union sought an agreement from the Company which would require "as

a condition of continued employment" that all employes not already members of the Union, and new employes hired thereafter at the employer's Indiana locations, must pay to the Union within thirty days after the agreement, or of their initial employment, whichever is later, "a sum equal to the initiation fee charged" members of each of the Union's locals and "monthly sums equal to the regular dues required" of its locals' "members at each location" (R. 100).

This was the same proposal which the Court of Appeals concluded the Union had made to General Motors (R. 111). Too, the proposal was the same as the one which the National Labor Relations Board concluded the UAW had made in its October 20, 1959 written bargaining request to the Company (R. 54).

The Company regarded this as the only proposal concerning which it had been asked to bargain. It made this abundantly clear to the Union on October 27, 1959, in writing, when it advised the Union that it declined to comply with its request to bargain concerning the "agency shop" arrangement "*as * * * detailed in your letter of October 20, 1959 * * **" (R. 103). (Emphasis supplied.)

The Record does not reveal or support a conclusion that the Union at any time intended, or claimed, its "agency shop" proposal was other than as specified by the language of its letter of October 20, 1959 to the Company.

At the unfair labor practice hearing before the Board's Trial Examiner, following the issuance of the complaint against the Company because of its unwillingness to discuss the UAW's "agency shop" proposal, the Vice President of the UAW, who had affixed his name to the letter containing the specific "agency shop" proposal made to the Company, was examined extensively concerning it (R. 81-93).

He acknowledged familiarity with the proposal (R. 81). During the course of the examination of this witness by counsel for the Company, the Trial Examiner, after having asked for and examined the letter of October 20, 1959 in which the Union's "agency shop" proposal was set forth, stated:

> "Trial Examiner: I just want to be sure what issue I have before me. I just want that to be clear. The only one I have before me is the proposal in that letter, is that correct?" (A. 83)

In answer to the Trial Examiner's question, counsel for the Union replied:

> "Mr. Cranefield: That's correct. * * *" (R. 83)

When the Union's Vice President was asked by counsel for General Motors as to whether the UAW's proposal was "intended to be the same as the agency shop covered by the decision in the Meade case referred to" in the Union's letter of October 20, 1959, counsel for the Union objected to the question because the letter "and the proposal therein contained speaks for itself" (R. 93). The objection was sustained. Thereafter counsel for the Union, evidencing a desire to "sharpen the issue here, * * *" informed the Trial Examiner "* * * that our proposal embodies every essential substantive element of an agency-shop agreement * * *" (R. 93).

All of the foregoing demonstrates (1) that there is nothing in the language of the Union's proposal *itself* which either states specifically or creates any inference that the Union intended that a non-member of the Union was to have an "option" of either joining the Union or of paying an "agency shop" fee as a condition of continued employment with the Company and (2) that if there had been any such intention on the part of the Union, either

by the specific words used in its proposal or otherwise, such intention was completely negated by the testimony of its Vice President, who had conveyed the proposal to the Company, and by the Union's counsel. Together they established on the Record that the proposal spoke for itself and that it contained every essential substantive element of an "agency shop" agreement.

Only a passing statement by the Union's witness and a conclusion expressed by the Board in its Supplemental Decision and Order provide a possible basis for the Petitioner's specious "option" argument. An examination of this statement and this conclusion reveal that neither contains any substance which will support the "option" thesis.

First, during the course of his examination concerning the Union's "agency shop" proposal to the Company, the Union's Vice President indicated that he thought the proposal "would require the payment of a service fee from those who chose not to be members, * * *" (R. 82). This testimony promptly caught the attention of the Trial Examiner who, after asking for and examining the letter of October 20, 1959 in which the witness had made the Union's "agency shop" proposal, said: "The reason I asked for the exhibit, the witness used a term that I didn't think was in the exhibit, and I don't see it in there. 'Service fees from those who chose not to be members.' I didn't recall anything in there that gave them a choice" (R. 83).

Apparently disturbed by the Trial Examiner's observation, and presumably to make certain that the Trial Examiner did not read some non-existent words into the Union's proposal, and also to make certain that the Trial Examiner clearly understood the witness' testimony, counsel for the Union immediately stated, "If I may be permitted, Mr. Examiner, I would suggest that *neither you nor the Board ought to infer* from the term used by the

witness the idea *that any other proposal than that embodied in the letter is in his mind*" (R. 83). (Emphasis supplied.)

Second, the only other possible basis for an "option" argument stems from the following conclusion expressed in the next to the concluding paragraph in "The Refusal to Bargain" section of the Board's Supplemental Decision and Order:

> "The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, * * *" (R. 66).

This conclusion is not based upon any finding of fact made by the Board in that Supplemental Decision and Order.[1] There is no support for it anywhere in the Record. What the Union sought is spelled out—as the Union emphasized continually on the Record—in the words of its proposal. No "option" can be found expressly or by inference in that proposal.

The Board's conclusion appears to be based upon the following groundless assumption expressed in the preliminary portions of the Board's Supplemental Decision and Order:

> "* * * the question of the legality of an agency-shop provision here must be viewed as contemplating an arrangement in which, while employment is conditioned upon payment of the equivalent of dues and fees, all employees are *given the option* of be-

[1] In rendering its Supplemental Decision and Order vacating an original 3-to-2 decision upholding the Company's position herein, the Board made no specific findings of fact and adopted from the original Decision only "the formal parts consisting of the procedural aspects of the case and the findings as to the business of the Respondent and as to the labor organization, * * *" (R. 54).

coming, or refraining from becoming, members of the Union." (R. 60-61.)

Note that the Board did not say that the Union's proposal made to General Motors *contained* an "option." It obviously could not have stretched the Record that far. Rather, it speculated that an "option" was *contemplated*. Having taken this first step, it was not difficult for the Board to make the jump to its unwarranted conclusion that the Union's proposal contained such an "option."

It is, in any event, sheer sophistry to argue that any such "option," as was erroneously read into the Union's proposal by the Board, could exist or have any meaning in a state, such as Indiana, which has a statute prohibiting the conditioning of continued employment upon membership in a labor organization.

The Union's proposal cannot be considered as some abstract proposition divorced from the factual and legal circumstances out of which it arose. Those circumstances were, of course, that the State of Indiana had a statute which prohibited conditioning continued employment upon membership in a labor organization. As a consequence, the union security arrangements in the collective bargaining agreement between the Union and the Company requiring membership of employes in the Union as a condition of continued employment could not be made operative in that State.

To circumvent this difficulty it was proposed by the Union that an agreement be entered into whereby non-member employes in the Company's Indiana plants would at least be required to pay to the Union a specified sum as a condition of their continued employment. The Board, quite as an afterthought, has said, and continues to urge, that the Union's proposal *contemplated* an "option." This

"option," it is asserted, arises from the fact that as a condition of continued employment employes could elect either to become members of the Union or, if they chose not to join, to pay a sum of money equivalent to the Union's initiation fee and monthly dues.

The difficulty with this theory, of course, is that it presents an employe with a meaningless choice. The individual cannot be compelled to make the "membership election" because of his statutory right in Indiana to refrain from membership and still hold his job. Likewise, the individual has the statutory right under Federal Law to refrain from joining or assisting the Union in order to hold his job except in accordance with an agreement meeting the requirements of Sections 7 and 8(a)(3), which agreement must have as its basic requirement membership in a labor organization—a requirement admittedly not an ingredient of an "agency shop" arrangement. Realistically, a nonmember of the Union, faced with an "agency shop" arrangement, will have no real choice but to elect union membership since, by not making such choice, he will be compelled to make money payments to the Union equal in amount to the sums paid by members, but without getting the same benefits available to those members. As developed later in this Brief, such "encouragement of membership" violates Section 8(a)(3).

It is, therefore, a mere play on words to suggest that those employes covered by the Union's proposal, if it were made effective, would have any meaningful choice or "option" open to them because a compulsory choice is no choice at all. The Union's proposal is, and can be, nothing more or less than a device to exact the equivalent of the Union's initiation fee and periodic dues as a condition of continued employment from those employes in Indiana who choose to

exercise their statutory right not to become Union members in order to hold their jobs.

B. THE "AGENCY SHOP" PROPOSAL, CONCERNING WHICH THE UNION REQUESTED THE COMPANY TO BARGAIN, IS CONTRARY TO THE FUNDAMENTAL POLICY OF THE NATIONAL LABOR RELATIONS ACT AS EXPRESSED IN SECTION 7 THEREOF.

The "agency shop" proposal, concerning which the Union requested the Company to bargain, would compel each non-union member in the bargaining unit represented by the Union at the Company's Indiana plants to pay to the Union, as a condition of continued employment, a sum of money equivalent to the initiation fee and monthly dues required of members of the Union. The Union sought, under the guise of a claimed legitimate collective bargaining demand, to persuade the Company to agree to compel employes who, by virtue of Indiana law can be placed under no legal compulsion to join the Union, to pay the equivalent of the full price of Union membership as a condition of continued employment.

Nowhere in the amended National Labor Relations Act is there language expressly authorizing or permitting employers and labor organizations to enter into an "agency shop" arrangement such as the one here proposed by the Union.

Such a bargaining demand and any agreement incorporating such a demand flies directly in the face of basic Federal labor policy as expressed in Section 7 of the National Labor Relations Act, as amended:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

> own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities* • • •." (Emphasis supplied.)

Congress here declared and established in clear and unequivocal language the right of employes not only to engage in union activities and to undertake union obligations but also to enjoy their concomitant right to refrain therefrom.

What this statutory expression of basic labor policy makes clear, but is overlooked by the Union and the Petitioner in their contentions herein, is that the Act was passed primarily to secure the rights of employes and not to enhance the position of labor organizations or employers.

This was recognized as the fundamental objective of the National Labor Relations Act, even before the important 1947 amendments to the Act were added. In *National Labor Relations Board v. Schwartz*, 146 F. 2d 773, 774 (C.A. 5) the Court said:

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union."

Nothing in the Taft-Hartley amendments of 1947 or in any subsequent court decision renders the foregoing observation any less true today.

If Section 7, as amended in 1947, were limited solely to the enumeration of the rights specified therein, it is undeniable that all forms of union security and, indeed, any scheme, device, or arrangement requiring an employe to engage in union activities or to render assistance in any form to a union would be unlawful as a direct infringement on the rights of employes guaranteed by that Section.

The principal clause of Section 7, standing alone, renders unlawful, *prima facie*, not only the closed shop but also the union shop and maintenance of membership, as well as the "agency shop" proposed herein by the Union. The vice inherent in each of these arrangements is that each necessarily interferes with the protected Section 7 right of employes to refrain from forming or joining or assisting labor organizations.

Accordingly, employers or labor organizations contemplating or seeking to place limitations on the exercise by employes of the rights established and guaranteed in Section 7 must find special sanction in the Act for any such restrictions or suffer the consequences of committing an unlawful labor practice.

1. The sole limitation on the exercise by employes of their Section 7 rights is found in the statutory exception to that Section wherein permission is granted to employers and labor organizations to enter into agreements requiring membership in a labor organization as a condition of employment.

Having spelled out the rights of employes in the principal clause of Section 7, Congress carved out an exception to the exercise by employes of their otherwise unqualified rights guaranteed therein, by providing that employers and labor organizations may lawfully agree to interfere

with these protected rights (including the right to refrain from assisting a labor organization) but only to the extent of requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the amended Act.

By the express terms of this exception, the only lawful permissible interference with the rights of employes guaranteed in Section 7 is strictly limited to agreements requiring *membership* in a labor organization and then only to such agreements requiring membership as are "authorized" in Section 8(a)(3) of the amended Act. The language does not provide that an agreement is "authorized" which requires the payment of service fees or carrying charges *in lieu of membership.* Yet this is precisely the type of agreement which the Union proposal seeks to impose upon employes in the Company's plants in Indiana. The reference in the Section 7 exception is clearly to the first proviso of Section 8(a)(3) wherein employers are permitted to make an agreement with a labor organization to require, as a condition of employment, *membership* in a union within a specified period of time providing certain other conditions, not here relevant, have been met.

Section 8(a)(3) provides in pertinent part that:

> "It shall be an unfair labor practice for an employer—
>
> • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothing in this Act,* or in any other statute of the United States, *shall preclude an employer from making an agreement with*

> *a labor organization* • • • *to require as a condition of employment membership therein* on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, • • •." (Emphasis supplied.)

The Section 8(a)(3) proviso quoted and emphasized above spells out in language which is clear and unequivocal on its face the only type of collective bargaining agreement that may permissibly infringe upon the rights guaranteed to employes in Section 7 and not expose an employer to a violation of Section 8(a)(3). Such an agreement must be limited to conditioning continued employment upon membership in a labor organization. An examination of the quoted proviso makes it clear, without the need to resort to legislative history or other aids to determine the intent of Congress, that to condition employment on anything other than *membership* in a labor organization is contrary to the mandate of the statute.

As an exception to, or limitation on, the national labor policy of securing employe rights as specified in Section 7 of the Act, sound principles of statutory construction require that the "union security" proviso of Section 8(a)(3) be strictly construed.

It is an established rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso. The Supreme Court in *Spokane & Inland Empire Railroad Company v. United States*, 241 U.S. 344, 350 phrased the rule as follows:

> "But to so treat the act would be in plain disregard of the *elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed* • • •." (Emphasis supplied.)

In *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al.*, 315 U.S. 685, 694-695, the Court made the following observation concerning the construction to be placed on the first proviso of Section 8(a) of the original Act:

> "The provision for a closed shop, as permitted by §8(3), follows grammatically a prohibition of discrimination in hiring. *These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization.*" (Emphasis supplied.)

The relationship between the national policy as expressed in Section 7 and the union security exception thereto is nowhere more clearly stated than in the Board's decision in *Bryan Manufacturing Company*, 119 NLRB 502, 510; enf. 264 F. 2d 575 (C.A.D.C.); rev'd on other grounds 362 U.S. 411, wherein former NLRB Member Jenkins, in his concurring opinion, points out:

> "Union-security clauses authorized by the proviso clause of Section 8(a)(3) are in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7. That section emancipates employees from coercion and restraint by labor and management alike. Their right to engage in or refrain from concerted activity at their own election has been enacted into law. But while that section enacted into law their right to engage in or refrain from concerted activities at their election, the proviso clause allows a contrac-

> tual compulsion of union membership and thus restricts the free choice otherwise provided by Sections 7 and 8(a)(3). The authority so conferred by the proviso is, however, carefully circumscribed by conditions precedent to and by limits upon its exercise. As an exception to declared public policy, a union-security clause, the conditions under which it was executed, and action pursuant to it merit, when subject to dispute, strict scrutiny."

On its face, it is apparent that the Union's proposal for an "agency shop" does not involve "membership" as that term is commonly understood. Only agreements which require "membership" as a condition of employment are authorized by the quoted proviso to Section 8(a)(3). To construe that proviso as authorizing, as well, agreements which require something *other than membership* as a condition of employment would represent an unsound and offensive departure from the foregoing rule of statutory construction. Such construction would have the effect of undermining the general prohibition against discrimination which Congress spelled out in the principal clause of Section 8(a)(3) and undermining also the employe rights protected by Section 7.

The Petitioner, by arguing that the word "membership" as used in the first proviso of Section 8(a)(3) embraces an "agency shop" arrangement, has advanced the astonishing doctrine that for purposes of Section 8(a)(3) nonmembership in a union means the same thing as membership therein. This cavalier treatment of the plain words of a Congressional enactment runs contrary to the frequent instruction of this Court that in matters of statutory construction the duty of a tribunal is to give effect to the intent of Congress as expressed in the words used in the statute. *Flora v. United States*, 357 U.S. 63. When the language of a statute is clear and unambiguous, as the

Court of Appeals here concluded (R. 114), it is not necessary to consult legislative history to determine what Congress intended.

In *National Labor Relations Board v. Coca-Cola Bottling Company*, 350 U.S. 264, 268, the Court had before it the proper construction of the term "officer" as used in Section 9(h) of the amended Act. In language which can be applied with equal force to the word "membership" herein, Justice Frankfurter, speaking for the Court, said:

> "Neither §9(h) itself nor its legislative history attempts a definition of 'officers'. 'Officers' is a word of familiar usage and, (a)fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Certainly, it would be the uncommon man seeking to bend the statute to his own purposes who would contend that non-membership is embraced by the term "membership" as used therein. It defies the imagination to conceive of a more strained and unnatural construction.

The word "membership" as used in the amended Act is not a word of art to which Congress has attached a special meaning. It is a clear and commonly understood term designating the state or status of being admitted into an organization or society typically requiring the payment of dues, the adherence to a program, or compliance with some other requirements of membership.

As was pointed out by Mr. Justice Burton concurring in *Jencks v. United States*, 353 U.S. 657, 679:

> "• • • the essential element of membership in an organized group—(is) *the desire of an individ-*

nail to belong to the organization and a recognition by the organization that it considers him as a member." (Emphasis supplied.)

The above-quoted analysis of "membership" is particularly relevant in this case since the issue before the Court in *Jencks* was the proper construction of the word "member" as used in Section 9(h) of the same statute involved herein.[2]

In this case, of course, it has been stipulated that there are employes in the Company's Indiana plants "who do not desire to become members of the Union or its Locals, and who would not desire to make support payments to the Union or its Locals should a type of agreement such as that proposed by the Union, * * *" (R. 77) be accepted by Petitioner. Moreover, it is clear from the testimony of the Union's Vice President that the Union's Constitution does not recognize as members those persons who would make support payments pursuant to an "agency shop" arrangement (R. 90-91).

Had Congress intended to give the term "membership" some special meaning, such as that set forth in the Board's Supplemental Decision and Order, it could have done so in Section 2 of the amended Act where other words and phrases used in the Act are specifically defined. Similarly, as the Court of Appeals properly held (R. 115), had Congress intended to permit the exaction of the fees called for by the Union's proposal to the Company in lieu of union membership as a condition of employment, it could easily have so provided in apt language.

---

[2] Although Section 9(h) has since been deleted from the National Labor Relations Act in the amendments thereto contained in the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525; 29 U.S.C. 159, such deletion in no way detracts from the value of Justice Burton's observation as to the nature of "membership".

2. The scope of the exception to Section 7 is not enlarged by Section 8(a)(1).

Section 8(a)(1) of the amended Act neither expands nor reduces the area of allowable bargaining spelled out in Section 8(a)(3).

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employes in the exercise of rights guaranteed in Section 7. As has been seen, the exercise of Section 7 rights is limited only by agreements requiring *membership* as authorized in Section 8(a)(3).

In the instant case, no contention is made that the Union's "agency shop" proposal is grounded upon union membership. The testimony of the Union's Vice President makes it clear that the UAW seeks an arrangement with the Company which conditions continued employment upon something other than membership in the Union (R. 82; 92).

The Union already has a valid union shop arrangement with the Company which requires generally that all employes whom the Union represents, under the provisions of the National Agreement with the Company must become and remain members of the Union to retain their jobs, but such arrangement cannot be made operative with respect to those employes represented by the Union in those Indiana plants of the Company involved here because of the Indiana "right-to-work" law. Patently, an "agency shop" agreement is designed to require non-union employes, who may not be compelled to become members,

to contribute instead financial assistance to a labor organization, as a condition of continued employment.

Because, as has been demonstrated already, the exaction sought by the Union under its proposed "agency shop" arrangement does not meet the requirements and limitations of Section 8(a)(3), it follows that any such arrangement, if made effective, would interfere with the rights guaranteed to employes in Section 7 and, as a consequence, would constitute a clear violation of Section 8(a)(1). That such would be the unlawful result is the view of this Court (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17).

3. The scope of the exception to Section 7 is not enlarged by Section 8(a)(3).

Section 8(a)(3) of the amended Act prohibits employes from engaging in any acts which have a tendency to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment. As an exception to or limitation upon this general prohibition, Congress gave to employers and labor organizations, in the first proviso of Section 8(a)(3), permission to make agreements which require, as a condition of employment, membership in a labor organization on or after the thirtieth day following the beginning of employment or the effective date of such agreements, whichever is later.

The relevant statutory language is as follows:

> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> • • •

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein or or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *."

As an exception to the statutory prohibition spelled out in the principal clause of Section 8(a)(3), the first proviso thereto, which authorizes the execution of agreements conditioning continued employment on membership in a union, is subject to the same rules of strict statutory construction to which reference has been made earlier in this Brief (P. 21-25 *ante*). *Spokane & Inland Empire Railroad Company v. United States*, 241 U.S. 344, 350; *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al.*, 315 U.S. 685, 694-695 and *Bryan Manufacturing Company*, 119 NLRB 502, 510; enf. 264 F. 2d 575 (C.A. D.C.); rev'd on other grounds 362 U.S. 411.

In short, the only arrangements which can meet the requirements of the exception to the general statutory prohibition are those which obligate an employe either to become a member or to maintain his membership in a labor organization. Because the Union's proposal for an "agency shop" involves no such requirement of membership, it would, if incorporated into an agreement, afford the Company no protection from the full sweep of the principal clause of Section 8(a)(3) were it to enforce such an agree-

ment against employes who refuse to comply with its provisions.

The proposed "agency shop" arrangement, if made operative, would require the Company to "discriminate in regard to hire or tenure of employment or any term or condition of employment" contrary to the express prohibition of the principal clause of Section 8(a)(3).

It is likewise clear that such an "agency shop" agreement would have the effect or result, or both, of encouraging membership in a labor organization. To the extent that Union members receive benefits by virtue of their membership over and above the benefits received by "agency shop" non-members, the latter will be encouraged to seek membership as long as they are paying monthly dues anyway, in order to take advantage of the additional benefits offered Union members, particularly where, as here, the non-member must also pay the equivalent of a Union initiation fee.[3] (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.)

---

[3] What the Union here seeks would impose upon non-members and new employes the financial burden of supporting it as their representative to the same extent that it could impose such burden upon all employes it represents in a bargaining unit covered by a valid union shop provision. This is tantamount to charging for representation, contrary to the requirement imposed upon a bargaining representative "not to discriminate in the execution of its duties between its own members and employes who belong to another union *or to no union*." (Emphasis supplied.) See *Hughes Tool Co. v. National Labor Relations Board*, 147 F. 2d 69, 74-75 (C. A. 5), cited with approval in *Conley et al. v. Gibson et al.*, 355 U.S. 41, 46, wherein the Court said:

> "The Act makes no provision for paying the bargaining representatives. Where a union serves as such, it looks for its financial support to the agreement of its members to pay dues. • • • It must serve all employees alike as their representative, and secure itself in its office of representative only by the skill, efficiency, and fairness with which it executes that office."

The inequality between the rights and privileges guaranteed members and the non-members covered by the Union's "agency shop" proposal is clearly apparent from a reading of the Union's Constitution (R. 95-97), and from an examination of the testimony of the Union's Vice President at the hearing before the Trial Examiner.

As was candidly admitted by that witness in his testimony, the Union's Constitution is not written in terms of non-members—"It is written in the sense of membership" (R. 90). The Union thus readily concedes that the whole range of rights and privileges spelled out in its Constitution is designed for members only (R. 89-92). With respect to the most important of these rights of members, such as the right to participate in union meetings, the right to vote on ratification of agreements negotiated by the Union (which would include an "agency shop" agreement such as that sought here by the Union), and the right to vote on how dues money is to be allocated within the Union, it is clear that the Union has no intention of making these rights available to the non-members.

Certain other rights and privileges to which members are entitled by virtue of their membership, such as receiving the Union newspaper through which the Union advises *members*, at no additional cost to them, "as to all matters relating to wages, hours, and conditions of employment," strike benefits, participation in programs for retirees, and educational benefits, would be available to non-members, only as a matter of the Union's discretion (R. 87-90; 92).

Thus, the non-member bound by an "agency shop" arrangement such as that here proposed by the Union would no longer be a "free rider," as the Union has chosen to characterize him, but rather a second-class passenger pay-

ing first-class fare. It is submitted that this dissimilar treatment of members and "agency shop" non-members will of necessity encourage the non-members to join the Union in order to obtain the first-class accommodations for which they will have paid.

By agreeing to such an arrangement which has as its necessary effect the encouragement of union membership, the Company would violate Section 8(a)(3) of the amended Act. (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.)

4. The final "proviso" of Section 8(a)(3) is inapplicable and, in any event, provides no basis for holding that the "agency shop" arrangement proposed herein is lawful.

While the Company believes the arguments already made in this Brief with respect to Sections 7, 8(a)(1) and the principal clause and first "proviso" of 8(a)(3) are dispositive of the issue in this case, the argument by the Petitioner that the final "proviso" of Section 8(a)(3) affords a basis for holding that the "agency shop" proposal herein is lawful requires comment. That the Board predicated, in part, its Supplemental Decision and Order on such an argument is indicated in its opinion where it stated:

> "* * * we are unable to distinguish, so far as its legality is concerned, the instant agency shop proposal from any other union-security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees." (R. 66).

That portion of the final "proviso" of Section 8(a)(3) applicable to the Petitioner's argument reads:

"• • • Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization • • •.

"(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

By its very terms, this proviso presupposes the existence of an agreement requiring membership as a condition of continued employment and then goes on to specify the minimum requirements which an employe must meet (i.e., tender of dues, etc.) in order to secure the protection from discrimination provided by Section 8(a)(3).

To read this proviso as enlarging upon the exception set forth in Section 7 of the Act so as to authorize the type of arrangement here demanded by the Union would be a deliberate distortion of the clear meaning and intent of the language used by Congress. Only by disregarding the basic language of Section 8(a)(3) and preempting powers reserved to Congress did the Board conclude that the Union's "agency shop" proposal is made legitimate by reason of this proviso.

If Section 8(a)(3) had ended with the first "proviso" thereof and the language of the final "proviso," upon which the Petitioner relies solely, was not included elsewhere in the Act, an employe under a union shop contract would be required to meet every condition of union membership in order to retain his job. Moreover, since labor organizations have control over the admission and expulsion of members, it is clear that an employe under such circumstances could be denied membership by a labor organization

for any reason, or no reason, or afforded membership only under discriminatory circumstances. If the employe were denied membership, he would also be denied a job.

The final "proviso" to Section 8(a)(3) exists only to prevent that abuse. It does not provide that something other than membership can be made a condition of employment. Nor does it say that something other than actual membership, as might be spelled out in a labor organization's Constitution or By-Laws, is to be treated as the equivalent of membership within the meaning of the first "proviso."

Where, as in the present case, no agreement is contemplated which would require membership as a condition of employment, the final "proviso" of Section 8(a)(3) can not become applicable or operative with respect to the proposal of the Union. That proviso says:

> "• • • That no employer shall justify any discrimination against an employee for *non-membership* • • •." (Emphasis supplied.)

In the absence of a contract making membership a condition of employment there can be no discrimination for non-membership. Thus, because the Union's "agency shop" proposal does not require membership as a condition of employment, a request to the Company for the discharge of an employe thereunder would be, of necessity, for failure to render financial assistance to the Union and not for non-membership therein.

What the Board has done in its Supplemental Decision and Order is to rewrite the law. But this is a responsibility which rests with the Congress as the Court of Appeals properly concluded (R. 115). Ordinarily the function of an administrative or quasi-judicial agency, such as the

Board, is to interpret and administer the statute as given to it. Where, as here, the language of the statute which is entrusted to the agency is clear and unambiguous (R. 114; See also *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17), the agency is relieved of the problems of interpretation created by possible conflicting statutory language. Here the Board has gone far beyond its responsibility and authority by abandoning its duty to administer the law as written. In essence, it has legislated rather than administered. It was this mistake which the Court of Appeals refused to compound. The transparency of the argument made by the Petitioner before the Court of Appeals that the "agency shop" was something less than a union shop compelled the Court to conclude that the proposed arrangement was not "something lesser," but, to the contrary, "entirely different" (R. 114). The proposal did not contain the essential requirement of the only form of agreement sanctioned by Section 8(a)(3) that could lawfully infringe upon the rights guaranteed to the individual worker under Section 7: namely, "membership in a labor organization." As the Court stated:

> "A Union security agreement is premised upon membership in a labor organization. An 'agency shop' on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment." (R. 114.)

C. THE COURT OF APPEALS ACTED PROPERLY IN HOLDING THAT THE CLEAR, UNAMBIGUOUS WORDS USED BY CONGRESS IN ENACTING THE STATUTE RENDERED THE "AGENCY SHOP" ILLEGAL, AND THAT RESORT TO LEGISLATIVE HISTORY TO DETERMINE WHAT THE STATUTE MEANT WAS NEITHER NECESSARY NOR REQUIRED.

A considerable portion of Petitioner's Brief is devoted to an attempt to establish the validity of the UAW's "agency shop" on the basis of legislative history.

The issue presented in this case does not involve a situation in which resort to legislative history is warranted or necessary in order to know the meaning of the statute.

The relevant statutory language is clear and unambiguous (R. 114). It requires no construction. There can be no dispute as to what the purpose of the statute is and "where the intention of the legislature is so apparent from the face of the statute there can be no question as to the meaning, there is no room for construction." (*Sutherland Statutory Construction*, 3rd Edition, Vol. 2, Sec. 4701.) "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction." (*Swarts v. Siegel, et al.*, 117 Fed. 13, 18 (C.A. 8).) The Court of Appeals properly applied this canon (R. 115).

This Court has said in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40-42, that "The language of §8(a)(3) is not ambiguous." Elsewhere in that same case the Court said:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§8(a)(3) and 8(b)(2) were designed to allow em-

ployees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available to the employee on the same terms and conditions generally applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.' • • • *Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.*" (Emphasis supplied.).

General Motors continues to urge, as it did before the National Labor Relations Board, and as it did successfully before the Court of Appeals, that the language of the relevant statutory provisions should be read and applied literally.

Adherence to literalness in applying the words of a statute is not offensive in the eyes of the law as long as such literalness does not lead to an absurd result. A literal reading of the clear, unambiguous statutory language here does not produce an absurd result but, to the contrary, effectuates the fundamental policy of the Act which is to insulate the individual worker from interference with his protected right "to form, join, or assist labor organiza-

tions" or "*to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment* • • •" (Emphasis supplied.)

D. THE TWO BOARD DECISIONS AND TWO COURT DECISIONS UPON WHICH THE PETITIONER RELIES PRINCIPALLY ARE EITHER INAPPOSITE OR SUPPORT THE POSITION OF GENERAL MOTORS.

In support of its contentions, Petitioner relies principally upon four cases—two Board decisions, *Public Service Company of Colorado*, 89 NLRB 418, 419 and *American Seating Company*, 98 NLRB 800, and two court decisions, *Radio Officers' Union v. National Labor Relations Board, et al.*, 347 U.S. 17, and *Union Starch & Refining Company v. National Labor Relations Board*, 186 F. 2d 1008, (C.A. 7) cert. den. 342 U.S. 815. Examination of these decisions shows that they either are not in point for the propositions for which they are cited or, in fact, support the position of General Motors.

Petitioner first cites *Public Service* as support for the proposition that the Section 8(3) proviso of the original Wagner Act "privileged an arrangement similar to the agency shop proposal here • • •" (Pet. Brief, pp. 19-21). Although *Public Service* was decided after the Taft-Hartley amendments of 1947, the decision in fact turned upon a construction of the original Wagner Act, as Petitioner notes. The Board found "that the savings clause in Section 102 of the amended Act would operate to preserve the legality of the support money provision *if that provision was valid under the original National Labor Relations Act*, • • •" (Emphasis supplied.)

The agreement in *Public Service* called for "support payments" to the union of $2.00 per month from employes not required to become members of the union as a condition of employment. These support payments were nowhere characterized as an "agency shop" nor do they bear any close resemblance to the scheme demanded here by the UAW. There was no showing in *Public Service* that all employes, regardless of their union affiliation, did not receive the same rights and benefits from the union for their flat $2.00 per month payment. Under the "agency shop" demanded by the UAW in the instant case, employes who pay, under compulsion, sums equivalent to the Union's initiation fee and membership dues will be guaranteed none of the rights and benefits of membership enjoyed by members who pay the same amount in membership dues and initiation fees.

Public Service thus involved a different agreement than that which is here before the Court. The agreement there was also being tested against statutory language different than that involved here. Far from being controlling authority in this case, *Public Service* has little more than historical interest as an expression of what one Board's views once were on the validity of a support money provision under the Wagner Act. It did not involve a consideration of the impact which the important Taft-Hartley amendment to Section 7 would have had on the validity of the support money provision in that case or which such amendment has on the "agency shop" proposal here before the Court.

American Seating Company is next cited by Petitioner to buttress its contention that the first proviso of Section 8(a)(3), as amended by Taft-Hartley, "privileges not only the union shop but any less stringent arrangement under which employes are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment." (Pet. Brief, p. 28)

A careful reading of *American Seating* quickly discloses the error of such a conclusion. That case arose in Michigan which did not have a statute prohibiting the conditioning of continued employment upon membership in a labor organization. The Board, as a matter of fact, found that the union shop provision in the collective bargaining agreement in *American Seating* was lawful. The Board also found that "the Petitioner does not specifically challenge the validity of the union security provisions in the contract."

The union in *American Seating* could have enforced its union shop clause with impunity. This is unlike the situation in the instant case where the UAW, unable to enforce its existing union shop arrangement in its collective bargaining agreement with General Motors because of the Indiana statute which prohibits conditioning continued employment upon membership in a labor organization, resorts to its "agency shop" proposal to frustrate that law.

On its facts, *American Seating* thus presents a wholly different problem than that in the instant case. There was no "agency shop" arrangement in that case. There was, in fact, a valid and enforceable compulsory membership requirement which the union voluntarily agreed to waive for certain religious objectors on the condition that such employes pay to the union's welfare fund sums equivalent to the dues which would have been required of them as members.

The two Board decisions thus cited by Petitioner are wholly inapposite and cannot be regarded as controlling the validity of the "agency shop" proposal made by the Union in this case.

Petitioner next makes reference to the *Radio Officers* case in support of its position that because Congress in enacting Section 8(a)(3) was concerned with the problem of "free riders," it must have intended to sanction the "agency shop." (Pet. Brief, pp. 29-34). Examination of that opinion gives no indication that the Court was suggesting anything of the kind.

In *Radio Officers*, the Court had before it the issue of whether or not the acts complained of therein encouraged union membership in violation of Section 8(a)(3). In this connection, the Court was called upon to examine the term "membership" as used in that Section. The Court first pointed out that employes are free to engage in or not to engage in union activities except to the extent that such freedom is curtailed by union security agreements meeting the requirements of Section 8(a)(3). Indeed, as Petitioner notes, the Court emphasized that "The policy of the Act is to insulate employees' jobs from their organizational rights" and that "*The only limitation Congress has chosen to impose • • • is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts* • • •" (p. 40). (Emphasis supplied.)

It was only with reference to valid Section 8(a)(3) union security agreements which conditioned continued employment upon membership in a labor organization that the Court made the further statement, quoted by Petitioner, that the "legislative history clearly indicates that Congress intended to prevent lization of union security agreements for any purpose other than to compel payment of union dues and fees."

Where, as in this case, a proposed union security agreement does not comport with the requirements of Section 8(a)(3) of the amended Act, there can be no basis for com-

pelling employes to pay union dues and fees or equivalent sums of money to a union as a condition of continued employment. Far from suporting Petitioner's contentions, *Radio Officers* is very convincing authority for the position taken herein by General Motors.

Finally, Petitioner cites the *Union Starch* case in support of the proposition that the second proviso of Section 8(a)(3) has been construed so as to equate the forms of union security permitted by the first proviso of that Section with the "agency shop" proposed by the Union in this case.

In *Union Starch*, there was in effect a lawful union shop. Employes subject to these provisions tendered their dues without satisfying other union-imposed conditions of membership and were discharged for alleged non-compliance with the union shop requirement. It was held that the minimum requirement necessary to satisfy the membership obligation under the terms of a *valid union security agreement* was the tender of initiation fees and dues. None of these facts, of course, is involved in the instant case. The *Union Starch* decision presupposes the existence of a valid union security agreement and then goes on to specify the minimum requirements which employes must meet, namely, "tender of dues," in order to secure the protection from discrimination provided by Section 8(a)(3). Neither the court in *Union Starch* nor in any other case since has taken the further step and held that the mere payment of dues and initiation fees under a valid union security arrangement is the equivalent of membership, for all purposes, so as to equate an "agency shop" with the valid forms of union security based upon membership authorized by the first proviso of Section 8(a)(3). Here again Petitioner

has relied upon authority which has no bearing on the facts here before the Court.

E. THE ONE CONTENTION ADVANCED BY THE AMICI WHICH IS DIFFERENT FROM THE ALREADY ANSWERED ARGUMENTS MADE BY THE PETITIONER IS GROUNDED PRINCIPALLY UPON INACCURATE, MISLEADING, AND IRRELEVANT INFORMATION AND DATA.*

The joint *amici*, the AFL-CIO and the UAW, attempt to justify the alleged legality of the "agency shop" in a four-pronged argument dealing with the: (1) meaning of the language of the statute; (2) legislative intent; (3) the structure and operation of one section of the statute; and (4) public policy.

The views and position of General Motors with respect to the first three of the four specified facets of the arguments of the amici have been set forth in preceding sections of this Brief. The discussion here is addressed therefore to the remaining "Public Policy" facet of the argument advanced in support of the proposition that the Court below erred in finding the "agency shop" proposal made to General Motors to be illegal. (Amici Brief, pp. 12-14.)

Having erroneously concluded in their Brief that a Wagner Act NLRB decision (*Public Service Company of Colorado*, 89 NLRB 418) and an NLRB decision handed

* At the time of the preparation of this Brief, there was still pending before the Court a Motion of the Amici AFL-CIO and the UAW for leave to file a Brief Amicus. Accompanying the Motion was the joint Brief Amicus which was to be filed for consideration in this case (No. 404) and in Case No. 368, if the Motion was granted. Not knowing what disposition the Court will make of the Motion of the amici, the following argument is included herein to answer the contentions made in the Brief Amicus insofar as they relate to the issue raised in this case only.

down after the Taft-Hartley amendment to Section 7 of the Wagner Act (*American Seating Company*, 98 NLRB 800) upheld the legality of the "agency shop", the amici make the following unqualified assertion (Amici Brief, p. 12):

> "Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses.[5]
>
> [5] See Federal Mediation Service, *The Agency Shop* 25 (1959)."

One can conclude only that this language is intended and designed to impress upon the Court that a Federal Agency —which has as one of its principal functions the mediation and settlement of labor disputes, even to the point of suggesting forms of union security that may contribute to the solution of a management-labor controversy—has placed its official imprimatur upon, and at the same time authoritatively advised its "staff" of, the legality of the "agency shop."

This little known and not readily available "report" bears the following words on the flyleaf:

> "'In presenting this report on the agency shop, *I* have endeavored to cite documented clauses, cases and opinions as a means of effective assistance to Commissioners and others who may have interest in this variation of Union security. *The papers and the comments are those of the author, and are not*

to be interpreted as Federal Mediation and Conciliation Service policy or opinion.

Glenn C. Fleshman
Commissioner, FMCS
April 20, 1959"

(Emphasis supplied.)

This language identifies the "report" for what it is. It is a "private" document and certainly not a document of any governmental agency. It was prepared by an individual and, contrary to the impression the Brief would create, does not purport to be authored or approved by the Federal Mediation and Conciliation Service. The writer of the report cautions that the "papers and the comments" are his own, and emphasizes the caveat that what has been said is "not to be *interpreted* as Federal Mediation and Conciliation Service *policy* or *opinion*." (Emphasis supplied.)

In their Brief, immediately following reference to the aforementioned "report," the amici state (Amici Brief, pp. 12-13):

> "In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A survey by the BNA of 400 representative union contracts in effect as of mid-1960 disclosed that 'Agency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957.'"

This statement extracted from a limited study of a private organization (Bureau of National Affairs) attempts to leave the impression, based upon a study of 400 contracts, that 6 percent of *all* contracts contain an "agency shop."

Had the amici included the following language which appears after the above-quoted language in the same BNA survey, there would be no basis for such an impression:

> "Half of these provisions, however, appear in conjunction with union shop clauses in contracts covering multi-state operations; the agency shop applies, to the extent that it is lawful, in those states in which union-shop arrangements are forbidden by right-to-work laws. *So the agency shop exists as the sole form of union security in only 3 percent of contracts.*" (Emphasis supplied.) (46 LRRM 14, 18.)

The Petitioner has gone even further in placing reliance upon the BNA study by asserting that arrangements of the type proposed by the Union to General Motors "are *now* written into 6 percent of collective bargaining agreements, either alone or in conjunction with the union shop" (Amici Brief, p. 14). (Emphasis supplied.) What the Petitioner has done is to update the BNA's mid-1960 figures to 1963 with no substantiating documentation.

A conclusion that 3 percent of collective bargaining agreements contain an "agency shop" provision solely is open to considerable doubt when viewed in light of the results of a study by the Federal Government of "Union Security Provisions in Major Union Contracts, 1958-59." Of 1,631 contracts examined, covering seven and one-half million workers, only 15 had clauses embodying the "agency shop" in some degree.[5]

The figures reported by the BNA, even if relevant, should have little persuasive appeal because of the small number of contracts studied. The Bureau of Labor Statistics of the United States Department of Labor estimated that in 1961, the year following that to which the BNA study related, there were approximately 150,000 collective bargaining contracts in effect in the United States.[6]

---

[5] 82 Monthly Labor Review 1348, 1351—Table 2.

[6] 85 Monthly Labor Review 1136.

At stake in this case is the right of individual workers to be free from having to furnish financial support to a labor organization in order to hold their jobs, absent an arrangement requiring "membership" as a condition of employment. This right should not be determined, evaluated, or recognized on the basis of mere statistics. The livelihood of individuals should not be dealt with in such a summary manner.

Whether an "agency shop" is included in one contract or in a thousand contracts or whether those contracts cover 10 people or 100,000 people should not be determinative of the legality of the contract arrangement. The sole test is—does the statute sanction the agency shop? If it does not, 1,000 contracts containing the arrangement or the fact that many workers may have paid tribute under the arrangement for innumerable years to protect their jobs and livelihood will not establish the legitimacy of the "agency shop." Only the law should do that.

F. THE "AGENCY SHOP" ARRANGEMENT, DEMANDED BY THE UAW, BEING VIOLATIVE OF THE ACT, GENERAL MOTORS HAS NO OBLIGATION TO BARGAIN WITH RESPECT THERETO.

The Board and the courts have frequently recognized that subjects of possible collective bargaining may be divided into three general categories—those which are mandatory subjects of bargaining; those which are permissive subjects of bargaining; and those which are prohibited or illegal subjects of bargaining. The latter category includes possible subjects of bargaining which would, if embodied in a collective bargaining agreement, violate the specific language or basic policy of the Act or of some other law. It has been held repeatedly that neither party to collec-

tive bargaining is obligated to negotiate upon demands of this nature.

Thus, in *National Maritime Union of America*, 78 NLRB 971, 981-982, enf. 175 F. 2d 686 (C.A. 2) cert. den. 338 U.S. 954, the Board stated:

> "But what the Act does not permit is the insistence, * * * that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy."

Implicit in the foregoing expression is the corollary proposition that an employer is under no duty to bargain with respect to a proposal which on its face is unlawful or inconsistent with the express language or basic policy of the Act.[7]

---

[7] See *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958); *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952).

CONCLUSION

Because General Motors would violate the National Labor Relations Act, as amended, if it agreed to and made operative the "agency shop" arrangement demanded of General Motors by the UAW, General Motors has no statutory duty to bargain concerning it. Accordingly, the judgment of the Court below should be affirmed.

Respectfully submitted,

ALOYSIUS F. POWER,
HARRY S. BENJAMIN, JR.,
Attorneys for General Motors Corporation,

EUGENE L. HARTWIG,
Of Counsel.

March 6, 1963.